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Docket No. 91-1394

IN THE

Supreme Court of the United States

October Term, 1991

RONALD J. WYLES
and
REGINA L. WYLES,

Petitioners,

v.

DEAN W. SWORD, JR., TRUSTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the non-alienation provision of the Employee Retirement Insurance Security Act of 1974 ("ERISA") constitutes "applicable non-bankruptcy law" under 11 U.S.C. § 541(c)(2) so that the non-alienation and anti-assignment provisions contained in an ERISA and Internal Revenue Code qualified employee pension or profit sharing plan exclude a debtor's interest in the plan from the debtor's bankruptcy estate.

PARTIES TO THE PROCEEDINGS

The Petitioners are Ronald J. Wyles ("Wyles") and Regina L. Wyles ("Regina", collectively with Wyles, "Petitioners"). The Respondent is Dean W. Sword, Jr., Trustee of the estate in bankruptcy for Petitioners.

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REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

This case is pending in the United States Court of Appeals for the Fourth Circuit. This case has not been heard or decided by the Fourth Circuit and has been held in abeyance pending the disposition of Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991), No. 91-913 by this Court. (Appendix pp.A24-A25). The Order of the United States District Court for the Eastern District of Virginia (Appendix pp.A1-A8) is not reported. The Opinion and Order of the United States Bankruptcy Court for the Eastern District of Virginia (Appendix pp.A9-A23) is not reported.

JURISDICTIONAL GROUNDS

The Order of the United States District Court for the Eastern District of Virginia was filed on May 22, 1991. The Notice of Appeal to the United States Court of

Appeals for the Fourth Circuit was filed by the Respondent on June 12, 1991 and the record on appeal was docketed in the United States District Court of Appeals for the Fourth Circuit on July 10, 1991. This case has not been heard or decided by the United States Court of Appeals for the Fourth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

This case involves 28 U.S.C.§ 2101(e); 11 U.S.C. §§ 541(a)(1) and 541(c)(2); 29 U.S.C. § 1056(d)(1); and 26 U.S.C. § 401(a)(13). These statutes are reprinted in pertinent part at Appendix pp.A26-A32.

STATEMENT OF THE CASE

On June 22, 1990, Petitioners filed their original petition for bankruptcy, pursuant to Chapter 7, Title 11, United States Code in the United States Bankruptcy Court, Eastern District of Virginia, Norfolk Division.

Petitioners exempted their interest in a "Money Purchase Pension and Profit Sharing Plan," having a value of approximately $945,000, representing their share of two separate retirement plans included in the property identified on Schedule B of their bankruptcy schedules. They are: (a) the Dermatology, Inc. of Virginia Beach Money Purchase Pension Plan and Trust, dated December 1, 1987 ("Pension Plan"), and (b) the Dermatology, Inc. of Virginia Beach Profit Sharing Plan and Trust, dated December 1, 1987 ("Profit Plan," collectively, the Pension Plan

and the Profit Plan, the "Plans"). The relevant provisions of the Plans are reprinted at Appendix pp.A33-A90.

On November 15, 1990, Respondent, the Trustee, filed an objection to Wyles' claim that his interests in the Plans are exempt property. On February 6, 1991, the Bankruptcy Court entered its Opinion and Order agreeing with the Petitioners' position and following the decision of the Fourth Circuit in In re Moore, 907 F.2d 1476 (4th Cir. 1990), by declaring that Petitioners' interests in the Plans are not assets of Petitioners' bankruptcy estate. On May 22, 1991, the Bankruptcy Court's decision was affirmed on de novo review by Order of the United States District Court for the Eastern District of Virginia. On June 12, 1991, the Respondent filed his Notice of Appeal to the United States Court of Appeals for the Fourth Circuit

and on July 10, 1991, the record on appeal was docketed in the United States District Court of Appeals for the Fourth Circuit.

Wyles is a 54 year old physician. Since 1974, Wyles has been an employee of Dermatology, Inc. of Virginia Beach, a Virginia corporation ("Corporation").

1. Terms of the Plans. At the time the Petitioners filed for bankruptcy, the Corporation had both the Pension Plan and the Profit Plan. Both Plans were effective as of December 1, 1987, and are qualified defined contribution plans under the Internal Revenue Code of 1986, as amended ("Internal Revenue Code") and ERISA. Eleven employees of the Corporation, including Wyles, participate in the Plans. As of December 31, 1989, the value of Wyles' interest in the Pension Plan was $458,014.20 and the value of Wyles' interest in the Profit Plan was $487,019.17.

Plan beneficiaries have no access to the assets of the Plans and neither Plan allows loans to Plan beneficiaries. (Pension Plan, Article IX, Appendix p.A51; Profit Plan, Article IX, Appendix p.A80). Plan beneficiaries may not pledge, encumber or alienate their interests in either Plan. (Pension Plan, § 7.03 and § 14.09, Appendix pp.A50-51, A60-61; Profit Plan, § 7.03 and § 14.09, Appendix pp.A79-A80, A89-A90). Benefits are paid from a Plan to a beneficiary only when the Plan beneficiary reaches the normal retirement age of 59 1/2. (Pension Plan, § 1.31 and § 6.05(a)(2), Appendix pp.A33, A36-A39; Profit Plan, § 1.31 and § 6.05(a)(2), Appendix pp.A62, A65-A68). Even if a Plan beneficiary terminates employment with the Corporation before age 59 1/2, the beneficiary may not receive vested benefits before reaching age 59 1/2. Id.

Beneficiaries cannot cash out their benefits in the form of lump sum payments at any time. (Pension Plan, § 1.38, Article VI, and § 10.08, Appendix pp.A33-A51; Profit Plan, § 1.38, Article VI, § 10.08, Appendix pp.A62-A80).

The anti-alienation and anti-assignment provisions of the Plans meet the requirements of the Internal Revenue Code and ERISA. In addition, these provisions are spendthrift in nature. The Plans provide that payments may only be made for the support and maintenance of Plan beneficiaries and, to the extent permitted by law, the benefits, proceeds, payment or amounts held or paid by the trustee of the Plans are not subject to the claims of creditors of Plan beneficiaries. (Pension Plan, § 6.05 and § 14.09, Appendix pp.A36-A41, A60-A61; Profit Plan, § 6.05 and § 14.09 Appendix pp.A65-A70, A89-A90).

The Corporation alone has the power to amend or terminate the Plans. (Pension Plan, Article XII, Appendix pp.A52-A60; Profit Plan, Article XII, Appendix pp.A81-A89). An amendment to or termination of the Plans requires the action of the Corporation's Board of Directors.

2. Prior ERISA Plans. The Plans in question, effective December 1, 1987, were preceded first by plans adopted in 1974 at the Corporation's organizational meeting ("1974 Plans") and subsequently by plans adopted in 1983 ("1983 Plans"), which replaced the 1974 Plans. All of the 1974 Plans and the 1983 Plans were Internal Revenue Code and ERISA-qualified plans. The 1987 Plans were adopted by the Corporation to amend and restate the previous Plans to comply with new requirements of the Internal Revenue Code. Wyles was a participant in both of the 1974 Plans and the

1983 Plans. The assets of the 1974 Plans and the successor 1983 Plans became assets of the Plans when adopted. Thus, all assets in the Plans are subject to the provisions of the existing Plans.

3. Corporate Structure. The Corporation was formed in 1974. At that time, Wyles was its sole shareholder, sole director and president and Regina was its secretary. In November, 1987, Wyles sold half his stock in the Corporation to George C. Harr ("Harr"). When Harr became a 50% shareholder, the Corporation amended its Bylaws to add Harr as the second member of its Board of Directors. With the addition of Harr as a shareholder, officer and director, it became necessary and desirable to have an outside party acting as trustee of the Plans. The Corporation named Michael J. Torpey trustee of the Plans.

Currently, Harr is president and Wyles secretary, of the Corporation.

REASONS FOR GRANTING THE PETITION

A petition for a writ of certiorari to review a case pending in a United States Court of Appeals, before judgment is rendered, will be granted by this Court only on a showing that the case is of such imperative public importance that it justifies deviation from normal appellate practice and requires immediate resolution in this Court. Sup. Ct. R. 11; 28 U.S.C. § 2101(e). This Court has granted writs of certiorari before judgment in the Court of Appeals when another case raising the identical issues was already before this Court. See, e.g. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 12 n. 1, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); Hannah v. Slawson, 363 U.S. 420, 422-

423, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960); Wilson v. Bohlander, 361 U.S. 281, 283, 80 S.Ct. 305, 4 L.Ed.2d 282 (1960).

This case involves issues identical to those raised in Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991), No. 91-913, pending before this Court. The Shumate case presents the question whether an interest in an ERISA-qualified pension plan should be included in the property of a debtor's bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1). In both cases, debtors' interests in ERISA-qualified plans have been held exempt from inclusion in their bankruptcy estates under the decision of the Fourth Circuit in In Re Moore, 907 F.2d 1476 (4th Cir. 1990). Because of the great similarity between these two cases, the Fourth Circuit entered an Order on September 26, 1991 holding this case in abeyance pending disposition of Shumate in this Court or in the

alternative, for summary disposition. (Appendix pp.A24-A25).

The issue presented by both this case and Shumate is of monumental importance to debtors, trustees, the public policy set forth by Congress in enacting ERISA and to the public, all being concerned with the funding of retirement for citizens of the United States. Legislation has been introduced in both houses of Congress concerning this issue.[1] Currently, there is a split in the Circuits on this issue. The Third, Fourth, Sixth and Tenth Circuits hold that 11 U.S.C. § 541(c)(2) excludes debtors' interests in ERISA-qualified plans from their bankruptcy estates while the Fifth, Eighth, Ninth and

[1]S.1985, introduced November 19, 1991 would amend 11 U.S.C. § 541(c) to clarify that a debtor's interest in an ERISA-qualified plan is excluded from the bankruptcy estate. H.R. 3804, introduced November 19, 1991 would have the same result.

Eleventh Circuits hold that interests in ERISA-qualified plans are not excluded by 11 U.S.C. § 541(c)(2) unless the plans constitute spendthrift trusts under state law.[2] Since this important issue is already before this Court in Shumate, this petition is an appropriate invocation of certiorari jurisdiction before judgment in the Fourth Circuit. Sup. Ct. R. 11, 28 U.S.C. § 2101(e).

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[2]Velis v. Kardanis, 949 F.2d 78 (3rd Cir. 1991); In re Moore, 907 F.2d 1476 (4th Cir. 1990); Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991); In re Lucas, 924 F.2d 597 (6th Cir.), cert. denied 111 S.Ct. 2275 (1991); and In re Harline, 950 F.2d 669 (10th Cir. 1991) all hold that a debtor's interest in a qualified ERISA plan is excludeable under Bankruptcy Code 11 U.S.C. § 541(c)(2). In re Goff, 706 F.2d 574 (5th Cir. 1983); In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Daniel, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S.Ct. 1199, 89 L.Ed.2d 313 (1986) and In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985) hold that interests in ERISA-qualified plans are not excludeable unless they qualify as valid spendthrift trusts under state law.

11 U.S.C. § 541(c)(2) provides that a restriction on the transfer of a beneficial interest in a trust, enforceable under "applicable non-bankruptcy law," is enforceable in bankruptcy. If a debtor's interest in a trust is subject to a restriction on transfer enforceable under applicable non-bankruptcy law, then the debtor's interest in the trust is not included in the debtor's bankruptcy estate.

The Fourth Circuit has recently considered and affirmatively answered the question whether the restrictions on transfer necessary to allow profit sharing or pension plans to constitute ERISA-qualified plans were restrictions enforceable under "applicable non-bankruptcy law" for purposes of 11 U.S.C. § 541(c)(2). Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991); In re Moore, 907 F.2d 1476 (4th Cir. 1990). To constitute an ERISA-

qualified plan, ERISA and the Internal Revenue Code and regulations promulgated thereunder require that a plan must prohibit the anticipation, assignment, alienation, attachment, garnishment, levy or execution of or other legal or equitable process against the benefits provided by the plan. 26 U.S.C. § 401(a)(13); Treas. Reg. 1.401(a)-13(b)(1).

In Moore, the Fourth Circuit specifically held that ERISA constitutes applicable "non-bankruptcy law" and that a debtor's interests in ERISA-qualified profit sharing and pension plans are excluded from the debtor's estate and from the reach of the debtor's creditors. Id, at 1479. The Fourth Circuit held that the phrase "applicable non-bankruptcy law" was clear on its face and that an appeal to legislative history was inappropriate. Moore, at 1478 citing Davis v.

Michigan Department of Treasury, 489 U.S. 803, 109 S.Ct. 1500, 1504 n.3, 103 L.Ed.2d 891 (1989). The Fourth Circuit stated:

> '[a]pplicable non-bankruptcy law' means precisely what it says: all laws, state and federal under which a transfer restriction is enforceable. Nothing in the phrase 'applicable non-bankruptcy law' or in the remainder of § 541(c)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law.

Moore, at 1477.

In Shumate, the Fourth Circuit based its decision on its holding in Moore and held that Moore "stands for the proposition that all ERISA-qualified plans, which by definition have a non-alienation provision, constitute 'applicable non-bankruptcy law' and contain enforceable restrictions on the transfer of

pension interests." Shumate, at 365. Citing this Court's decision in Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990), the Fourth Circuit noted that ERISA's non-alienation requirement reflected a considered congressional policy choice to safeguard a stream of income for pensioners even if that decision prevented others from securing relief for the wrongs done them. Shumate, at 365. The Fourth Circuit concluded that the ERISA restrictions represented a strong public policy against the alienability of an ERISA plan participant's benefits. Therefore, the Fourth Circuit held that the debtor's interest in the pension plan was excluded from the bankruptcy estate. Shumate, at 365.

In this case, the District Court also based its decision on Moore. The District Court, citing Moore, held that "all

laws, state and federal" constituted "applicable non-bankruptcy law" as used in § 541(c)(2). (Appendix p.A3). The District Court noted that the Moore court found no support for the trustee's claim that the phrase only applied to state spendthrift law and concluded that ERISA may constitute "applicable non-bankruptcy law" for purposes of § 541(c)(2). (Appendix pp.A3-A4). Again citing Moore, the District Court stated "because ERISA clearly prevents general creditors from reaching a debtor's interest in this ERISA-qualified trust, it constitutes applicable non-bankruptcy law under which restrictions on the transfer of pension interests may be enforced." (Appendix p.A4).

As acknowledged by the Trustee, both of the Plans established by the Corporation are qualified plans under the Internal Revenue Code and ERISA. As ERISA-

qualified plans, the Plans contain the required restrictions on transfer. The Moore and Shumate decisions hold that these restrictions on transfer are restrictions enforceable under applicable non-bankruptcy law. Therefore, as a result of the transfer restrictions and under Moore and Shumate, Petitioners' interests in the Plans are not includeable in their bankruptcy estate and are not subject to the reach of their creditors or to an objection to their exempt status by the Trustee.

Like the District Court, the Bankruptcy Court also closely reviewed the Moore decision in deciding that the Plans are not includeable in Petitioners' bankruptcy estate. The Bankruptcy Court focused on the policy goals enunciated in Moore, such as

> . . . insuring uniformity of law, not allowing

> pension assets to be reached through an involuntary proceeding, and not allowing an entire plan to be disqualified through the attachment of the interest of a single beneficiary. In this case the settlor is the Corporation and the beneficiaries are the employees of the Corporation. At least nominally they cannot amend or terminate the plan. Nor, at this time, are they permitted to make unrestricted withdrawals from the plan or borrow against their interests in it.

(Appendix pp.A18-A19).

In addition, the Bankruptcy Court was concerned about the negative effect of a failure to follow Moore:

> Moreover, were the courts to hold that such a closely held corporation cannot place pension assets beyond the reach of creditors in bankruptcy, it could have enormous

> impact. Many plans would be cancelled. Many creditors would attempt to force the owners of closely held and professional corporations into involuntary bankruptcy in order to reach the pension assets. Many of these plans could lose their tax exempt status. All of this runs contrary to the policy choices which underlay the decision in Moore.

(Appendix pp.A20-A21).

Not only were the decisions in both Shumate and this case based on identical grounds contained in the Moore decision, there is no substantial distinction between the facts in this case and those in Shumate other than the amount of money involved and the degree of control exercised by the debtors over their respective corporations. For example: (1) Shumate and Wyles both held significant blocks of the common stock of their respective corporate sponsors of the

pension plans during the relevant times; (2) both Shumate and Wyles were officers and directors of their respective corporate plan sponsors; (3) both Shumate and Wyles were employed by their respective corporations; (4) all contributions to the plans came from their respective corporations; and (5) neither Shumate nor Wyles made any voluntary contributions to their respective pension plans. The Fourth Circuit found that the facts in this case and Shumate were so similar that it held this case in abeyance pending final resolution of Shumate by this Court. (Appendix pp.A24-A25).

The similarity between the facts of this case and Shumate, together with decisions based on identical grounds contained in the Moore case, and the monumental national importance of the ERISA issues to debtors, trustees, and the general public, make it

appropriate that this case should be heard and considered together with Shumate even before the present case is determined by the Fourth Circuit Court of Appeals.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari be granted, that the argument for Shumate No. 91-913 be postponed and that the two cases be consolidated and set for argument concurrently or consecutively.

Respectfully submitted,

RONALD J. WYLES and
REGINA L. WYLES,
Petitioners

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PROOF OF SERVICE

I, Thomas R. Frantz, one of the attorneys for Petitioners and a Member of the bar of the Supreme Court of the United States, hereby certify that three (3) true copies of the foregoing were mailed, first class postage prepaid, to James R. Sheeran, Esquire, Marcus, Santoro & Kozak, Post Office Drawer 69, Portsmouth, VA 23705, Debera F. Conlon, Assistant U. S. Trustee, Room 433, Federal Building, 200 Granby Mall, Norfolk, Virginia 23510, Robert A. Lefkowitz, Esquire, Maloney, Yeatts & Barr, P.C., 600 Ross Building, 801 East Main Street, Richmond, Virginia 23219-2906, and G. Steven Agee, Esquire, Osterhoudt,

Ferguson, Natt, Aheron & Agee, P.C., 1919 Electric Road, S.W., Roanoke, Virginia 24018 on February 28, 1992.

AFFIDAVIT FOR PROOF OF FILING

I, Thomas R. Frantz, one of the attorneys for Petitioners and a member of the bar of the Supreme Court of the United States, hereby certify that I hand delivered by courier to the Clerk of the Supreme Court of the United States within the time allowed for filing, the foregoing Petition for Writ of Certiorari on March 2, 1992.

Thomas R. Frantz

Signed and sworn before me, at Virginia Beach, Virginia, this 28th day of February, 1992.

Carol S. Farrer
Notary Public

My commission expires: 11/13/92

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RONALD J. WYLES
and
REGINA L. WYLES,

Petitioners,

v.

DEAN W. SWORD, JR., TRUSTEE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE:	RONALD J. WYLES REGINA L. WYLES	CIVIL ACTION NO. 91-147-N

ORDER

The trustee in bankruptcy has appealed the decision of the bankruptcy court to exempt debtor's interests in two ERISA-qualified pension and profit sharing plans from the bankruptcy estate. Debtor's interests in these plans is approximately $945,033. The bankruptcy court, per Bonney, J., found a recent Fourth Circuit case, In re Moore, 907 F.2d 1476 (1990), controlling on the issue of whether ERISA qualified as "applicable nonbankruptcy law" under the Bankruptcy Code, 11 U.S.C. §541(c)(2), thereby placing the ERISA plans beyond the reach of the trustee in bankruptcy. The court also

enjoined both (1) the trustee of the ERISA plans from making any premature distribution to debtor prior to his reaching the age of 59 and 1/2 years, and (2) the directors of the corporation from amending the plans to authorize distributions to debtor.

We now AFFIRM the decision of the bankruptcy court on the basis of In re Moore.

The relevant facts of this case were stipulated to by the parties in the proceeding below and fully outlined by the bankruptcy court in its Opinion and Order. We will not restate them here. Our review of this matter is de novo because of the predominantly legal nature of the question before the Court, i.e., whether this debtor's interest in ERISA plans are, as a matter of law, properly excluded from the bankruptcy estate. See United States

v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

The Bankruptcy Code exempts a debtor's interests in certain trusts from the bankruptcy estate. Section 541(c)(2) of Title 11 U.S.C. provides, in pertinent part, that:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

In Moore, the Fourth Circuit Court of Appeals interpreted "applicable nonbankruptcy law" to encompass "all laws, state and federal under which a transfer restriction is enforceable." See Moore, 907 F.2d at 1477 (emphasis added). The court, upon examining the legislative history of this section, found no support for the trustee's claim that the phrase applied only to state spendthrift law. Id. at 1478-

1479. Thus, ERISA may constitute applicable nonbankruptcy law for purposes of § 541(c)(2).

The second conclusion of the Moore court, also pertinent to the case at bar, concerned whether an ERISA-qualified plan contains an enforceable restriction on transfer that would bring the ERISA statute within the bounds of "applicable nonbankruptcy law" under § 541(c)(2). To this query, the Moore court's answer was equally clear: "[b]ecause ERISA clearly prevents general creditors from reaching a debtor's interest in this ERISA-qualified trust, it constitutes 'applicable nonbankruptcy law' under which restrictions on the transfer of pension interests may be enforced." Id. at 1480. In reaching this conclusion, the Moore court excluded debtors' interests in ERISA plans from the bankruptcy estate.

The trustee in bankruptcy has urged this Court to break ranks with the Fourth Circuit and adopt a new standard for determining whether a pension plan should be included in, or exempted from, the bankruptcy estate. This new approach would have a debtor's interest in a defined benefits plan deemed a non-asset and exempted from the estate; a debtor's interest in a defined contribution plan would be deemed an asset and included in the estate. While we recognize the novelty of trustee's argument, we decline to fashion a new standard in the face of clear and binding precedent in this circuit.

Alternatively, trustee has attempted to categorize this particular ERISA plan as a "self-settled trust," which the Moore court had indicated, at least indirectly, was

properly included in the bankruptcy estate.[1]

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[1] See In re Moore, 907 F.2d at 1478, where the court distinguishes cases where other circuits have read the statutory term "applicable nonbankruptcy law" narrowly to refer only to state spendthrift trust law. See In re Daniel, 771 F.2d 1352 (9th Cir. 1985); In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Goff, 706 F.2d 574 (5th Cir. 1983):

> These decisions have, in the main, involved self-settled trusts in which the settlor is the beneficiary with the power to amend or to terminate the trust without penalty, whereas here the beneficiaries do not control the plan, cannot make unrestricted withdrawals from it, cannot borrow against it, and cannot amend it.

The clear implication is that "self-settled trusts" will be deemed part and parcel of the bankruptcy estate. Trustee has characterized the bankruptcy court's opinion as extending Moore to self-settled trusts. We disagree with this reading of the opinion as we glean no finding that debtor's trust was self-settled.

Moreover, we are in accord with the bankruptcy court's finding that, while debtor does maintain a significant degree of control over these plans by virtue of his directorship and shareholdings, the policy goals of ERISA plans, outlined in Moore, inter alia, the need

That debtor has been able to contribute approximately 25% of his income to these plans by virtue of the ERISA laws, thereby shielding it from taxation, is not a sufficient ground for garnering the plans into the bankruptcy estate.

Finally, we find no error in the lower court's finding that debtor has committed no fraud, legal or otherwise, in his formation of, and administration of the plans. "The trust was simply a vehicle to provide for the retirement of the corporation's employees, including Dr. Wyles." See Bankruptcy Opinion and Order at 7.

No objection has been raised by either party to that portion of the bankruptcy court's order enjoining the trustee of the

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to protect the interests of the 11 other members of the plan from creditors, must also be weighted by the Court. See Bankruptcy Opinion at 6; Trustee's Opening Brief at 20.

plans from making any premature distributions to debtor or his assignees, and also enjoining the directors from amending the plans to allow distribution. Therefore, we need not address this issue.

The decision of the bankruptcy court is AFFIRMED in its entirety.

IT IS SO ORDERED.

/s/ John A. MacKenzie
United States District
Judge

Norfolk, Virginia
May 22, 1992

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

In re

RONALD J. WYLES,
REGINA L. WYLES

Debtors.

BANKRUPTCY CASE NO.
90-23018-B

OPINION AND ORDER

This case comes upon the trustee's objection to the debtor's claim of exemptions in two Employee Retirement Income Security Act (hereinafter "ERISA") 29 U.S.C. § 1001 et seq. qualified pension plans. Thanks to the commendable efforts of counsel, all relevant facts have been determined by stipulation.

STIPULATED FACTS

On June 22, 1990 Dr. Ronald J. Wyles (hereinafter "Dr. Wyles") and his wife Regina L. Wyles filed a joint Chapter 7 bankruptcy

petition with the United States Bankruptcy Court for the Eastern District of Virginia, Norfolk Division. The Wyles' listed amount their exempt assets interests in a pension and a profit sharing plan.

Dr. Wyles first became involved with ERISA qualified pension plans in 1973 as an employee of Virginia Beach Dermatology, Inc. In 1974 he ceased that employment and formed Dermatology, Inc. of Virginia Beach ("the Corporation"), a Corporation which he alone controlled for the next thirteen years. Dr. Wyles is, and has been since its formation, an employee of the Corporation. In 1974 the Corporation adopted ERISA qualified plans at its organizational meeting. Dr. Wyles was the trustee of those plans.

In 1979 Dr. Wyles, acting as the Corporation's sole director, amended the plan to allow loans to participants of up to 100%

of the participant's share in the plan. Dr. Wyles took advantage of this change, borrowing $100,000 and repaying it the following year.

In 1983 Dr. Wyles, again acting as the Corporation's sole director, amended the plans, this time to keep the plans current with changes in the applicable laws.

Late in the year 1987, Dr. Wyles sold half of his stock in the Corporation to George C. Harr, M.D. Dr. Harr also became a director and officer of the Corporation and has attended all of the corporate meetings since 1987. The Corporation's bylaws provide that a single director is a quorum of the board of directors. Acting together as the board of directors of the corporation on December 1, 1987, Dr. Wyles and Dr. Harr approved the two plans at issue in this litigation.

The first is the Dermatology, Inc. of Virginia Beach Money Purchase Pension Plan & Trust (the "Pension Plan"), executed on December 1, 1987. The second is the Dermatology, Inc. of Virginia Beach Profit Sharing Plan and Trust (the "Profit Sharing Plan"), also executed on December 1, 1987. Both plans qualify as exempt plans under ERISA and the applicable sections of the Internal Revenue Code.

The trustee of both of these plans is Michael Torpey, an individual unrelated to Dr. Wyles or Dr. Harr. The plans both contain the anti-alienation and anti-assignment provisions required to maintain their tax exempt status. However, both plans also allow the trustee to make discretionary distributions to the beneficiaries under certain circumstances.

Eleven employees of the Corporation participate in the plan. The employee with the largest share is Dr. Wyles. He is the beneficiary of roughly 72% of the assets. On June 22, 1990, the date of Dr. Wyles' filing, his interest in the Pension Plan was approximately $458,014.20 and his interest in the Profit Sharing Plan was approximately $487,019.17. Thus, the amount in dispute is approximately $945,033.37.

LEGAL ANALYSIS

The body of law construing ERISA is a complex and growing one as is the body of Bankruptcy law construing various pension statutes. Many of the issues under dispute in this case, however, have been recently settled by the Fourth Circuit. The case of In re Moore, 907 F.2d 1476 (4th Cir. 1990) controls much of the outcome of this case. An area of

great contention in Bankruptcy/ERISA litigation has been the interpretation of 11 U.S.C. 541(c)(2). This section provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." Many authorities, including those cited by the trustee, have examined the legislative history of this statute and found the phrase "applicable nonbankruptcy law" to mean state spendthrift law.

The court in Moore held that, for several reasons, the phrase "applicable nonbankruptcy law" includes Federal statutes such as ERISA. First, other uses of the same phrase found within the Bankruptcy Code refer to both Federal and state law. In re Moore, 907 F.2d at 1477-8. Second, the court found

the wording of the statute clear. Thus, no resort to legislative history was necessary. Id. at 1478-9. Finally, the court considered the legislative history to be ambiguous at best. Id. at 1479. The court did note a possible exception in the matter of self-settled trusts, of which this Court shall have more to say in a moment. The controlling principal to be derived from the initial pages of Moore, however, is that ERISA may constitute "applicable nonbankruptcy law" which exempts certain beneficial interests from the reach of creditors in a bankruptcy proceeding.

The court in Moore next considered "whether ERISA contains an enforceable transfer restriction that would bring the statute within the meaning of the term 'applicable nonbankruptcy law' in § 541(c)(2)." Id. The court noted that a plan

must contain restrictions on alienation, transfer, and accessibility to general creditors in order to qualify under ERISA and the applicable Internal Revenue provisions. Id. at 1480. The court stated "[b]ecause ERISA clearly prevents general creditors from reaching a debtor's interest in this ERISA-qualified trust, it constitutes "applicable nonbankruptcy law" under which restriction on the transfer of pension interests may be enforced." Id.

In reaching this decision, the court noted three policy considerations underlying its decision, all of which bear on this case. First, a contrary holding would allow creditors to push a debtor into involuntary bankruptcy in order to reach the assets in his or her pension plan. The court found no evidence that Congress intended such a result. Id. Second, to hold that the exemption of

pension plan assets depended on the state exemption laws would destroy much of the nationwide uniformity of treatment for pension plans which ERISA was created to ensure. The court stated "[o]ur holding ensures that the security of employee retirement benefits will not depend on the particularities of state spendthrift trust law." Id. Third, the court's holding also "avoids the specter of a bankruptcy trustee disqualifying an entire plan from tax exempt status by seeking turnover of a single bankrupt's interest in the plan." Id.

The trustee has cited a number of cases for the proposition that "applicable nonbankruptcy law" should be read to mean only state spendthrift trust law. The court in Moore stated, "[t]hese decisions have, in the main, involved self-settled trusts in which the settlor is the beneficiary with the power

to amend or to terminate the trust without penalty. . . we respectfully decline to follow this course." Id. at 1478. The Court did indicate, at least indirectly, that its opinion covered only a case in which the debtor had no control over the trust and no ability to reach the trust property. In distinguishing cases which have reached the opposite result, the court listed a number of factors which were not present in Moore, but which might alter the equation in another case. In Moore "the beneficiaries do not control the plan, cannot make unrestricted withdrawals from it, cannot borrow against it, and cannot amend it." Id.

This Court must examine these factors, keeping in mind the policy goals enunciated in Moore; namely, insuring uniformity of law, not allowing pension assets to be reached through an involuntary

proceeding, and not allowing an entire plan to be disqualified through the attachment of the interest of a single beneficiary. In this case the settlor is the corporation and the beneficiaries are the employees of the corporation. At lease nominally they cannot amend or terminate the plan. Nor, at this time, are they permitted to make unrestricted withdrawals from the plan or borrow against their interests in it.

Looking more closely at the situation, nevertheless, it becomes clear that this is not such a simple case. Dr. Wyles is not a lower level functionary at a large corporation having no control over the plan. He is a 50% shareholder of the Corporation and one of two directors. Since the corporation's bylaws provide that a single director is a quorum, Dr. Wyles could convene a meeting and amend or terminate the plan as he saw fit. In

such a closely held corporation, there is also a high likelihood that he might persuade Dr. Harr to consent to a loan or cash distribution. On the other hand, there is absolutely no showing that this trust was established or maintained by Dr. Wyles to defraud his creditors. For example, the evidence does not reveal any last minute, prebankruptcy planning. The trust was simply a vehicle to provide for the retirement of the Corporation's employees, including Dr. Wyles.

Moreover, were the courts to hold that such a closely held corporation cannot place pension assets beyond the reach of creditors in bankruptcy, it could have enormous impact. Many plans would be cancelled. Many creditors would attempt to force the owners of closely held and professional corporations into involuntary bankruptcy in order to reach the pension

assets. Many of these plans could lose their tax exempt status. All of this runs contrary to the policy choices which underlay the decision in Moore.

Accordingly, the trustee and any successor trustees are ENJOINED from making any distribution to Dr. Wyles, his assignees, or designees until such time as Dr. Wyles reaches the age of 59 and 1/2 years of age without order of this Court.

The Directors of Dermatology Inc., of Virginia Beach are ENJOINED from making any changes, amendments, alterations to the plans or authorizing any distributions from the plans to Dr. Wyles until he reaches the age of 59 and 1/2 years without order of this Court.

Should any distribution be made to Dr. Wyles, his assignees, or designees before he reaches the age of 59 and 1/2 years without the prior approval of the Court, the

bankruptcy estate will be reopened and those funds will be made available for the creditors of the estate.

The Court will look with favor upon a request for an alteration in the terms of the plans made solely to keep them in compliance with changes in Internal Revenue Code or the laws governing ERISA plans. Of course, any party in interest may seek a change in this Order should such be warranted by a change in Dr. Wyles' situation, including death, serious injury, incapacity, or the like.

IT IS SO ORDERED.

The clerk shall forward a copy of this Order to Mr. David H. Adams, Clark & Stant, P.C., 900 Sovran Bank Building, One Columbus Center, Virginia Beach, Virginia 23462 and to Mr. James R. Sheeran, Esq., Marcus, Santoro & Kozak, Post Office Drawer

69, Portsmouth, Virginia 23705 and to Ms. Debera F. Conlon, Esq., Office of the U.S. Trustee, 433 Federal Building, 200 Granby Street, Norfolk, Virginia 23510 and to Mr. Michael Torpey, M.J. Torpey & Assoc., 18th & Market Street, Philadelphia, Pennsylvania and to Dr. George C. Harr, Dermatology Inc. of Virginia Beach, 1200 First Colonial Road, Suite 200M, Virginia Beach, Virginia 23454.

/s/ Hal J. Bonney, Jr.
Judge

Norfolk, Virginia
January 28, 1990

FILED: September 26, 1991

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 91-1633

DEAN W. SWORD, JR.,

Plaintiff-Appellant,

versus

RONALD J. WYLES;
REGINA L. WYLES,

Defendants-Appellees.

O R D E R

Appellant has filed a motion to hold case in abeyance pending disposition of a similar case in the Supreme Court, or, in the

alternative, for summary disposition. Appellees have filed a response to the motion to hold case in abeyance, or in the alternative, for summary disposition.

The Court places this case in abeyance pending further order of the Court and directs counsel jointly to advise this Court promptly of any action taken by the Supreme Court of the United States upon any petition for certiorari filed in Shumate v. Patterson, No. 88-2174, or of the failure of the appellee in Shumate to file a petition for certiorari by November 11, 1991.

For the Court

/s/ John M. Greacen
CLERK

26 U.S.C. § 401. QUALIFIED PENSION, PROFIT-SHARING, AND STOCK BONUS PLANS

(a) **Requirements for Qualification.**--A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section--. . .

(13) **Assignment and alienation.--**

(A) In general.--A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation

is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders.--Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order

is determined to be a qualified domestic relations order.

Treasury Regulation § 1.401(a)-13 Assignment or alienation of benefits.

. . .**(b) No assignment or alienation--(1) General rule.** Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

28 U.S.C. § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

. . .(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

29 U.S.C. § 1056 Form and Payment of Benefits. . . .(d) Assignment or alienation of plan benefits.

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

11 U.S.C. § 541. Property of the Estate.

(a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302 or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. . .

. . .(c)(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title [11 USCS §§ 101 et seq.].

MONEY PURCHASE PENSION
PLAN AND TRUST
December 1, 1987
RELEVANT PROVISIONS

1.31. "Normal Retirement Age" means age fifty-nine and one-half (59½).

1.38. "Qualified Joint and Survivor Annuity" means an annuity for the life of the Participant with a survivor annuity for the life of the Spouse which is fifty percent (50%) of the amount of the annuity which is payable during the joint lives of the Participant and the Spouse, and which is the actuarial equivalent of the normal form of benefit, or, if greater, any optional form of benefit, payable for the life of the Participant.

ARTICLE VI

Time and Method of Payment of Benefits

6.01. Joint and Survivor Annuity. The provisions of this Article VI shall take precedence over any conflicting provision in this Plan. The provisions of this Article shall apply to any Participant who is credited with at least one (1) Hour of Service with the Company on or after August 23, 1984.

6.02. Qualified Joint and Survivor Annuity. A Participant's vested Accrued Benefit will be paid in the form of a Qualified Joint and Survivor Annuity.

6.03. Qualified Preretirement Survivor Annuity.

(a) If a Participant dies after reaching the Earliest Retirement Age, the Participant's Surviving Spouse (if any) will receive the same benefit that would be payable if the Participant had retired with an

immediate Qualified Joint and Survivor Annuity on the day before the Participant's date of death.

(b) If a Participant dies on or before reaching the Earliest Retirement Age, the Participant's Surviving Spouse (if any) will receive the same benefit that would be payable if the Participant had:

(1) separated from service on the date of death;

(2) survived to the Earliest Retirement Age;

(3) retired with an immediate Qualified Joint and Survivor Annuity at the Earliest Retirement Age; and

(4) died on the day after the Earliest Retirement Age.

(c) For purposes of 6.03(b) above, a Surviving Spouse may direct the

commencement of payments within a reasonable time after the Participant's death.

6.04. Notice Requirements. In the case of a Qualified Joint and Survivor Annuity as described in 6.02 above, the Administrator shall provide each Participant within a reasonable period prior to the commencement of benefits a written explanation of: (1) the terms and conditions of a Qualified Joint and Survivor Annuity; and (2) the rights of a Participant's Spouse.

6.05. Timing and Mode of Distributions.

(a) The amount to be distributed each year is for the support and maintenance of the Participant and/or his Beneficiary, and must be at least an amount equal to the quotient obtained by dividing the Participant's entire interest by the joint and last survivor expectancy of the Participant

and designated Beneficiary. Joint and last survivor expectancy is computed in accordance with Reg. 1.401(a)(9)-1. For purposes of this computation, a Participant's life expectancy may be recalculated no more frequently than annually, however the life expectancy of a non-spouse Beneficiary may be recalculated. If the Participant's Spouse is not the designated Beneficiary, the method of distribution selected must assure that at least fifty percent (50%) of the present value of the amount available for distribution is paid within the life expectancy of the Participant. The distributions shall be made as follows:

(1) For all Plan Years beginning before January 1, 1989:

(i) Distributions to 5-percent owners: The Accrued Benefit of a 5-percent owner (as described in Code §416(i)

determined with respect to the Plan Year ending in the calendar year in which such individual attains age 70-1/2) will begin to be distributed on the first day of April following the calendar year in which such individual attains age 70-1/2.

(ii) Distributions to non-5-percent owners: Distribution to a Participant other than a 5-percent owner will commence on the first day of April following the calendar year in which the later of termination of employment or age 70-1/2 occurs.

(2) For all Plan Years beginning after December 31, 1988, distribution to a Participant will commence on the first day of April following the calendar year in which the Participant reaches age 59-1/2. The rule stated in 6.05(a)(1)(ii) above shall apply to any Participant who has

attained age 70-1/2 prior to January 1, 1988, provided that such Participant is not a 5-percent owner at any time during the Plan Year ending with or within the calendar year in which the Participant attained age 66-1/2 or any subsequent Plan Year. In addition, a Participant who made an eligible election under the Tax Equity and Fiscal Responsibility Act of 1982 shall not be subject to this 6.05(a)(2).

(b) If the Participant dies after distribution of his interest has commenced, the remaining portion of such interest will continue to be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death.

(c) If the Participant dies before distribution of his interest commences, the Participant's entire interest will be

distributed no later than five (5) years after the Participant's death except to the extent that an election is made to receive distributions in accordance with (1) or (2) below:

(1) if any portion of the Participant's interest is payable to a designated Beneficiary, distributions may be made in substantially equal installments over the life or life expectancy of the designated Beneficiary commencing no later than one (1) year after the Participant's death; or

(2) if the designated Beneficiary is the Participant's Surviving Spouse, the date distributions are required to begin in accordance with (a) above shall not be earlier than the date on which the Participant would have attained age 70-1/2, and, if the Spouse dies before payments begin,

subsequent distributions shall be made as if the Spouse had been the Participant.

(d) For purposes of 6.05(c) above, payments will be calculated in accordance with Reg. 1.401(a)(9)-1. Life expectancy of a Surviving Spouse may be recalculated annually, however, in the case of any other designated Beneficiary, such life expectancy will be calculated at the time payment first commences without further recalculation.

(e) For purposes of 6.05, any amount paid to a child of the Participant will be treated as if it had been paid to the Surviving Spouse if the amount becomes payable to the Surviving Spouse when the child reaches the age of majority.

6.06. Inability to Locate a Participant or Beneficiary. Whenever the Trustee is directed to make distributions in

accordance with a notice provided by the Administrator, a mailing to the person or persons or to the Administrator at the addresses designated in such notice shall be adequate delivery of such distributions for all purposes. In the event that the whereabouts of a person entitled to benefits under the Plan cannot be ascertained by the Administrator and his whereabouts continue to be unknown for three (3) years, the Account of such Participant shall be treated as a forfeiture and allocated as provided for in Article III. However, if the Participant, or the Participant's Beneficiary, subsequently claims such Account, it shall be reinstated and paid to the Participant, or to the Participant's Beneficiary if the Participant is deceased.

6.07. Conditions to Distribution. Before any distribution is made, the Trustee

shall be furnished with any and all applications, certificates, tax waivers, signature guarantees or other documents which the Trustee deems necessary or advisable. The Trustee shall not incur any liability for complying with any directions appearing on their face to be genuine and may rely conclusively on such directions.

6.08. Small Accounts. Any provision of the Plan to the contrary notwithstanding, after a Participant has incurred a Break in Service, the Administrator shall have the authority to direct the settlement of any Qualified Joint and Survivor Annuity or Qualified Preretirement Survivor Annuity, having a vested account balance of $3,500 or less, by the payment of one lump sum to the Participant or his Beneficiary. This provision does not apply after benefits have commenced to be paid, or if the present value

is in excess of $3,500. If the Participant has died, then the Spouse must consent in writing to the distribution. If the Participant has suffered a Break in Service and his Account balance has been distributed to him, and if he is reemployed by the Company before he suffers five (5) consecutive one-year Breaks in Service, then he may contribute to the Plan, a sum equal to the amount he received in distribution, and his Years of Service prior to such Break in Service shall be considered as if there had been no Break in Service.

For all distributions made after December 31, 1986, to determine the present value of a Participant's Accrued Benefit, Qualified Joint and Survivor Annuity, or Qualified Preretirement Survivor Annuity, the Administrator will use an interest rate no greater than the interest rate that would be

used by the Pension Benefit Guaranty Corporation ("PBGC"). Such PBGC rate shall be computed as of the date of distribution, and shall be the rate used by PBGC for all lump-sum distributions upon Plan termination. If the present value of the vested Accrued Benefit is no more than $25,000, then the amount to be distributed to the Participant or Beneficiary is calculated using the PBGC rate. However, if the present value of the vested Accrued Benefit exceeds $25,000 (using the PBGC rate), then the amount to be distributed is determined by using an interest rate no greater than one hundred twenty percent (120%) of the PBGC rate as computed above. In no event can the amount distributed to the Participant fall below $25,000 if the interest rate used is one hundred twenty percent (120%) of the PBGC rate.

6.09. Distributions Under Domestic Relations Orders. Nothing contained in this Plan shall prevent the Trustee, in accordance with the direction of the Administrator, from complying with the provisions of a qualified domestic relations order (as defined in Code §414(p)).

The Administrator shall establish reasonable procedures to determine the qualified status of a domestic relations order. Upon receiving a domestic relations order, the Administrator promptly shall notify the Participant and any alternate payee named in the order, in writing, of the receipt of the order and the Plan's procedures for determining the qualified status of the order. Within a reasonable period of time after receiving the domestic relations order, the Administrator shall determine the qualified status of the order and shall notify the

Participant and each alternate payee, in writing, of its determination. The Administrator shall provide notice under this 6.09 by mailing to the individual's address specified in the domestic relations order, or in a manner consistent with Department of Labor regulations. The Administrator may treat any domestic relations order entered prior to January 1, 1985 as a qualified domestic relations order, irrespective of whether it satisfies all the requirements described in Code §414(p).

The Administrator shall also establish reasonable procedures to determine the qualified status of a drafted domestic relations order. Upon receiving a draft copy of a domestic relations order, the Administrator promptly shall notify the Participant and any alternate payee named in the order, in writing, of the receipt of the

draft copy of the order and the Plan's procedures for determining the qualified status of such draft. Within a reasonable period of time after receiving such draft copy, the Administrator shall determine the qualified status of such draft and shall notify the Participant and each alternate payee, in writing, of its determination. The Administrator shall provide notice under this 6.09 by mailing to the individual's address specified in such draft, or in a manner consistent with Department of Labor regulations.

If any portion of the Participant's Accrued Benefit is payable during the period the Administrator is making its determination of the qualified status of the domestic relations order, the Administrator shall direct the Trustee to aggregate the amounts payable in a separate account and to invest

the segregated account solely in fixed income investments. If the Administrator determines the order is a qualified domestic relations order within eighteen (18) months of the date when the first payment is required to be made under the order, the Administrator shall direct the Trustee to distribute the segregated account in accordance with the order. If the Administrator does not make its determination of the qualified status of the order within such eighteen (18) month period, the Administrator shall direct the Trustee to distribute the segregated account in the manner the Plan would distribute if the order did not exist and shall apply the order prospectively if the Administrator later determines the order is a qualified domestic relations order.

To the extent it is not inconsistent with the provisions of the qualified domestic

relations order, the Administrator may direct the Trustee to invest any partitioned amount in a segregated subaccount or separate account and to invest the account in federally insured, interest-bearing savings account(s) or time deposit(s) (or a combination of both), or in other fixed income investments. A segregated subaccount shall remain a part of the Trust, but it alone shall share in any income it earns, and it alone shall bear any expense or loss it incurs.

The Trustee shall make any payments or distributions required under this Section by separate benefit checks or other separate distribution to the alternate payee(s).

7.03. Assignment or Alienation. The Participant or the Beneficiary shall not assign or alienate any benefit provided under this Plan, and the Trustee shall not recognize

any such assignment or alienation. This 7.03 shall not apply to a qualified domestic relations order under 6.09. The purpose of this 7.03 is to protect the Participants' Accounts from anticipation, assignment, or alienation, and to prevent the attachment, garnishment, levy, execution, or other legal or equitable process against the Participants' Accounts.

ARTICLE IX

Loans to Participants

No loans to Participants are permitted under this Plan.

10.08. Distribution of Cash or Property. The Trustee may make distribution under the Plan in cash or property, or partly of each, based on the fair market value of such property, as determined by the Trustee.

ARTICLE XII

Exclusive Benefit, Amendments, Termination

12.01. Exclusive Benefit. The Company shall have no beneficial interest in any asset of the Trust, and no part of any asset in the Trust shall ever revert to or be repaid to the Company, either directly or indirectly, prior to the satisfaction of all liabilities with respect to the Participants and their Beneficiaries under the Company's Plan. No part of the corpus or income of the Trust Fund, or any asset of the Trust, may be used for, or diverted to, purposes other than the exclusive benefit of the Participants or their Beneficiaries.

12.02. Contingent Nature of Contributions. To the extent that the deductibility thereof is subsequently denied, any contribution made by the Company to the

Trust is made expressly contingent upon the deductibility of such contribution for Federal income tax purposes for the year with respect to which such contribution is made. Each such contribution is contingent upon maintenance of the qualified status of the Plan and Trust for the year with respect to which the contribution is made, to the extent that the loss of qualified status would deprive the Company of the deduction taken for such contribution. In the event that any refund is paid to the Company hereunder, such refund shall be without interest and shall be deducted from the Company contribution accounts of the Participants as an investment loss. All refunds shall be limited in amount, circumstance, and timing to the provisions of Act 403(c), including: (a) in the case a contribution is made by the Company by mistake of fact, the same may be returned to the

Company if made within one (1) year from the date of payment of the contribution which was made by a mistake of fact; (b) a contribution to the Plan which was conditioned on the qualification of the Plan under Code §401 and if the Plan does not so qualify, then the contribution may be returned to the Company within one (1) year after the date of the denial of qualification of the Plan; (c) if the contribution is made by the Company to the Plan conditioned upon the deductibility of the contribution under Code §404, then if the deduction is disallowed, the contribution may be returned to the Company, to the extent so disallowed, within one (1) year after the disallowance of the deduction; or (d) if the contribution is made by the Company to the Plan which would otherwise be an excess contribution, as defined in Code §4972(b), then a correcting distribution with respect to

such contribution may be made from the Plan to the Company to the extent permitted in Code §4972 to avoid the payment of excise taxes on excess contributions under such section.

12.03. Amendment of the Plan. The provisions of this Plan may be amended at any time by the Company; provided, however, that no amendment shall be effective unless written notice is given to the Trustee. No amendment shall increase the duties or liabilities of the Trustee or Administrator without its consent. No amendment shall deprive any Participant, or Beneficiary of a deceased Participant, of any of the benefits to which he is entitled under this Plan, or otherwise decrease the balance in any Participant's Account. No amendment shall provide for the use of funds or assets held to provide benefits under this Plan other than for the support and maintenance of Employees and their

Beneficiaries, or to provide that funds may revert to the Company.

Each amendment shall be approved by the Company's Board of Directors, or other management group if the Company is not incorporated. Notwithstanding the foregoing, any amendment necessary to initially qualify this Plan under Code §401(a) may be made without further approval of the Board of Directors (or such other group) if it is signed by the proper representatives of the Company.

12.04. Amendment to Vesting Schedule. The Company shall not amend the vesting schedule as set forth in 5.03 if the amendment would reduce the non- forfeitable percentage of any Participant's Accrued Benefit derived from Company or Participant contributions. If the Company makes a permissible amendment to the vesting schedule,

each Participant with three (3) Years of Service with the Company may elect to have the percentage of his nonforfeitable Accrued Benefit be computed without regard to the amendment. A Participant must file his election with the Administrator within seventy-five (75) days from his receipt of a copy of the amendment changing the vesting schedule. The Administrator, as soon as practicable, shall forward a copy of the amendment to the vesting schedule to each Participant with at least three (3) Years of Service together with an explanation of the effect of the amendment, the appropriate form on which the Participant may make an election to remain under the vesting schedule provided prior to the amendment, and the time within which the Participant must make an election to remain under the prior vesting schedule.

12.05. Discontinuance. The Company shall have the right, at any time, to suspend or discontinue its contribution under the Plan, and to terminate, at any time, this Plan and Trust. The Plan shall terminate upon the first to occur of the following:

(a) The date terminated by action of the Company;

(b) The date the Company shall be judicially declared bankrupt or insolvent; or

(c) The dissolution, merger, consolidation, or reorganization of the Company, or the sale by the Company of all or substantially all of its assets, unless the successor or purchaser makes provision to continue the Plan, in which event the successor or purchaser shall substitute itself as the Company under the Plan.

12.06. Full Vesting on Termination. Notwithstanding any other provision of this Plan to the contrary, upon the termination or partial termination of the Plan, or upon complete discontinuance of contributions to the Plan, a Participant's right to his Accrued Benefit shall be one hundred percent (100%) nonforfeitable. Partial termination, for purposes of this Plan, means a significant reduction in the number of Employees participating, or being eligible to participate, in this Plan. The Administrator shall interpret and administer this 12.06 in accordance with Code §411(d)(3).

12.07. Merger. The Trustee shall not consent to, or be a party to, any merger or consolidation with another plan or to transfer assets or liabilities to another plan, unless immediately thereafter, the surviving plan provides each Participant a

benefit equal to, or greater than, the benefit each Participant would have received had the Plan terminated immediately prior to the merger, consolidation, or transfer.

12.08. Termination. Upon termination of the Plan, the provisions of Article VI shall remain operative, and the Trust shall continue until the Trustee has distributed all of the benefits under the Plan. On each Allocation Date, the Administrator shall credit any part of a Participant's Accrued Benefit remaining in the Trust with his proportionate share of the Trust income, expenses, gains, and losses, both realized and unrealized.

14.09 Spendthrift Trust. This Plan is intended to qualify as a spendthrift trust. It is therefore intended that payments made pursuant to this Plan are for the support and

maintenance of the Participants and their Beneficiaries. To the extent permitted by law, none of the benefits, proceeds, payment or amounts held or paid by the Trustee under this Plan shall be subject to the claims of creditors of Participants or Beneficiaries of this Plan, the Trustee shall take such steps as it deems necessary to preserve such interest for the benefit of the Participant or his Beneficiary, however, this provision does not preclude the Trustee from complying with a court order requiring deduction from the benefits of a Participant in pay status for qualified domestic relations orders, as provided under Section 6.09.

PROFIT SHARING
PLAN AND TRUST
December 1, 1987
RELEVANT PROVISIONS

1.31. "Normal Retirement Age" means age fifty-nine and one-half (59½).

1.38. "Qualified Joint and Survivor Annuity" means an annuity for the life of the Participant with a survivor annuity for the life of the Spouse which is fifty percent (50%) of the amount of the annuity which is payable during the joint lives of the Participant and the Spouse, and which is the actuarial equivalent of the normal form of benefit, or, if greater, any optional form of benefit, payable for the life of the Participant.

ARTICLE VI

Time and Method of Payment of Benefits

6.01. Joint and Survivor Annuity. The provisions of this Article VI shall take precedence over any conflicting provision in this Plan. The provisions of this Article shall apply to any Participant who is credited with at least one (1) Hour of Service with the Company on or after August 23, 1984.

6.02. Qualified Joint and Survivor Annuity. A Participant's vested Accrued Benefit will be paid in the form of a Qualified Joint and Survivor Annuity.

6.03. Qualified Preretirement Survivor Annuity.

(a) If a Participant dies after reaching the Earliest Retirement Age, the Participant's Surviving Spouse (if any) will receive the same benefit that would be payable if the Participant had retired with an

immediate Qualified Joint and Survivor Annuity on the day before the Participant's date of death.

(b) If a Participant dies on or before reaching the Earliest Retirement Age, the Participant's Surviving Spouse (if any) will receive the same benefit that would be payable if the Participant had:

(1) separated from service on the date of death;

(2) survived to the Earliest Retirement Age;

(3) retired with an immediate Qualified Joint and Survivor Annuity at the Earliest Retirement Age; and

(4) died on the day after the Earliest Retirement Age.

(c) For purposes of §6.03(b) above, a Surviving Spouse may direct the

commencement of payments within a reasonable time after the Participant's death.

6.04. Notice Requirements. In the case of a Qualified Joint and Survivor Annuity as described in §6.02 above, the Administrator shall provide each Participant within a reasonable period prior to the commencement of benefits a written explanation of: (1) the terms and conditions of a Qualified Joint and Survivor Annuity; and (2) the rights of a Participant's Spouse.

6.05. Timing and Mode of Distributions.

(a) The amount to be distributed each year is for the support and maintenance of the Participant and/or his Beneficiary, and must be at least an amount equal to the quotient obtained by dividing the Participant's entire interest by the joint and last survivor expectancy of the Participant

and designated Beneficiary. Joint and last survivor expectancy is computed in accordance with Reg. §1.401(a)(9)-1. For purposes of this computation, a Participant's life expectancy may be recalculated no more frequently than annually, however the life expectancy of a non-spouse Beneficiary may be recalculated. If the Participant's Spouse is not the designated Beneficiary, the method of distribution selected must assure that at least fifty percent (50%) of the present value of the amount available for distribution is paid within the life expectancy of the Participant. The distributions shall be made as follows:

(1) For all Plan Years beginning before January 1, 1989:

(i) Distributions to 5-percent owners: The Accrued Benefit of a 5-percent owner (as described in Code §416(i)

determined with respect to the Plan Year ending in the calendar year in which such individual attains age 70-1/2) will begin to be distributed on the first day of April following the calendar year in which such individual attains age 70-1/2.

(ii) Distributions to non-5-percent owners: Distribution to a Participant other than a 5-percent owner will commence on the first day of April following the calendar year in which the later of termination of employment or age 70-1/2 occurs.

(2) For all Plan Years beginning after December 31, 1988, distribution to a Participant will commence on the first day of April following the calendar year in which the Participant reaches age 59-1/2. The rule stated in §6.05(a)(1)(ii) above shall apply to any Participant who has

attained age 70-1/2 prior to January 1, 1988, provided that such Participant is not a 5-percent owner at any time during the Plan Year ending with or within the calendar year in which the Participant attained age 66-1/2 or any subsequent Plan Year. In addition, a Participant who made an eligible election under the Tax Equity and Fiscal Responsibility Act of 1982 shall not be subject to this §6.05(a)(2).

(b) If the Participant dies after distribution of his interest has commenced, the remaining portion of such interest will continue to be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death.

(c) If the Participant dies before distribution of his interest commences, the Participant's entire interest will be

distributed no later than five (5) years after the Participant's death except to the extent that an election is made to receive distributions in accordance with (1) or (2) below:

(1) if any portion of the Participant's interest is payable to a designated Beneficiary, distributions may be made in substantially equal installments over the life or life expectancy of the designated Beneficiary commencing no later than one (1) year after the Participant's death; or

(2) if the designated Beneficiary is the Participant's Surviving Spouse, the date distributions are required to begin in accordance with (a) above shall not be earlier than the date on which the Participant would have attained age 70-1/2, and, if the Spouse dies before payments begin,

subsequent distributions shall be made as if the Spouse had been the Participant.

(d) For purposes of §6.05(c) above, payments will be calculated in accordance with Reg. §1.401(a)(9)-1. Life expectancy of a Surviving Spouse may be recalculated annually, however, in the case of any other designated Beneficiary, such life expectancy will be calculated at the time payment first commences without further recalculation.

(e) For purposes of §6.05, any amount paid to a child of the Participant will be treated as if it had been paid to the Surviving Spouse if the amount becomes payable to the Surviving Spouse when the child reaches the age of majority.

6.06. Inability to Locate a Participant or Beneficiary. Whenever the Trustee is directed to make distributions in

accordance with a notice provided by the Administrator, a mailing to the person or persons or to the Administrator at the addresses designated in such notice shall be adequate delivery of such distributions for all purposes. In the event that the whereabouts of a person entitled to benefits under the Plan cannot be ascertained by the Administrator and his whereabouts continue to be unknown for three (3) years, the Account of such Participant shall be treated as a forfeiture and allocated as provided for in Article III. However, if the Participant, or the Participant's Beneficiary, subsequently claims such Account, it shall be reinstated and paid to the Participant, or to the Participant's Beneficiary if the Participant is deceased.

6.07. Conditions to Distribution. Before any distribution is made, the Trustee

shall be furnished with any and all applications, certificates, tax waivers, signature guarantees or other documents which the Trustee deems necessary or advisable. The Trustee shall not incur any liability for complying with any directions appearing on their face to be genuine and may rely conclusively on such directions.

6.08. Small Accounts. Any provision of the Plan to the contrary notwithstanding, after a Participant has incurred a Break in Service, the Administrator shall have the authority to direct the settlement of any Qualified Joint and Survivor Annuity or Qualified Preretirement Survivor Annuity, having a vested account balance of $3,500 or less, by the payment of one lump sum to the Participant or his Beneficiary. This provision does not apply after benefits have commenced to be paid, or if the present value

is in excess of $3,500. If the Participant has died, then the Spouse must consent in writing to the distribution. If the Participant has suffered a Break in Service and his Account balance has been distributed to him, and if he is reemployed by the Company before he suffers five (5) consecutive one-year Breaks in Service, then he may contribute to the Plan, a sum equal to the amount he received in distribution, and his Years of Service prior to such Break in Service shall be considered as if there had been no Break in Service.

For all distributions made after December 31, 1986, to determine the present value of a Participant's Accrued Benefit, Qualified Joint and Survivor Annuity, or Qualified Preretirement Survivor Annuity, the Administrator will use an interest rate no greater than the interest rate that would be

used by the Pension Benefit Guaranty Corporation ("PBGC"). Such PBGC rate shall be computed as of the date of distribution, and shall be the rate used by PBGC for all lump-sum distributions upon Plan termination. If the present value of the vested Accrued Benefit is no more than $25,000, then the amount to be distributed to the Participant or Beneficiary is calculated using the PBGC rate. However, if the present value of the vested Accrued Benefit exceeds $25,000 (using the PBGC rate), then the amount to be distributed is determined by using an interest rate no greater than one hundred twenty percent (120%) of the PBGC rate as computed above. In no event can the amount distributed to the Participant fall below $25,000 if the interest rate used is one hundred twenty percent (120%) of the PBGC rate.

6.09. Distributions Under Domestic Relations Orders. Nothing contained in this Plan shall prevent the Trustee, in accordance with the direction of the Administrator, from complying with the provisions of a qualified domestic relations order (as defined in Code §414(p)).

The Administrator shall establish reasonable procedures to determine the qualified status of a domestic relations order. Upon receiving a domestic relations order, the Administrator promptly shall notify the Participant and any alternate payee named in the order, in writing, of the receipt of the order and the Plan's procedures for determining the qualified status of the order. Within a reasonable period of time after receiving the domestic relations order, the Administrator shall determine the qualified status of the order and shall notify the

Participant and each alternate payee, in writing, of its determination. The Administrator shall provide notice under this §6.09 by mailing to the individual's address specified in the domestic relations order, or in a manner consistent with Department of Labor regulations. The Administrator may treat any domestic relations order entered prior to January 1, 1985 as a qualified domestic relations order, irrespective of whether it satisfies all the requirements described in Code §414(p).

The Administrator shall also establish reasonable procedures to determine the qualified status of a drafted domestic relations order. Upon receiving a draft copy of a domestic relations order, the Administrator promptly shall notify the Participant and any alternate payee named in the order, in writing, of the receipt of the

draft copy of the order and the Plan's procedures for determining the qualified status of such draft. Within a reasonable period of time after receiving such draft copy, the Administrator shall determine the qualified status of such draft and shall notify the Participant and each alternate payee, in writing, of its determination. The Administrator shall provide notice under this §6.09 by mailing to the individual's address specified in such draft, or in a manner consistent with Department of Labor regulations.

If any portion of the Participant's Accrued Benefit is payable during the period the Administrator is making its determination of the qualified status of the domestic relations order, the Administrator shall direct the Trustee to aggregate the amounts payable in a separate account and to invest

the segregated account solely in fixed income investments. If the Administrator determines the order is a qualified domestic relations order within eighteen (18) months of the date when the first payment is required to be made under the order, the Administrator shall direct the Trustee to distribute the segregated account in accordance with the order. If the Administrator does not make its determination of the qualified status of the order within such eighteen (18) month period, the Administrator shall direct the Trustee to distribute the segregated account in the manner the Plan would distribute if the order did not exist and shall apply the order prospectively if the Administrator later determines the order is a qualified domestic relations order.

To the extent it is not inconsistent with the provisions of the qualified domestic

relations order, the Administrator may direct the Trustee to invest any partitioned amount in a segregated subaccount or separate account and to invest the account in federally insured, interest-bearing savings account(s) or time deposit(s) (or a combination of both), or in other fixed income investments. A segregated subaccount shall remain a part of the Trust, but it alone shall share in any income it earns, and it alone shall bear any expense or loss it incurs.

The Trustee shall make any payments or distributions required under this Section by separate benefit checks or other separate distribution to the alternate payee(s).

7.03. Assignment or Alienation. The Participant or the Beneficiary shall not assign or alienate any benefit provided under this Plan, and the Trustee shall not recognize

any such assignment or alienation. This §7.03 shall not apply to a qualified domestic relations order under §6.09. The purpose of this §7.03 is to protect the Participants' Accounts from anticipation, assignment, or alienation, and to prevent the attachment, garnishment, levy, execution, or other legal or equitable process against the Participants' Accounts.

ARTICLE IX

Loans to Participants

No loans to Participants are permitted under this Plan.

10.08. Distribution of Cash or Property. The Trustee may make distribution under the Plan in cash or property, or partly of each, based on the fair market value of such property, as determined by the Trustee.

ARTICLE XII

Exclusive Benefit, Amendments, Termination

12.01. Exclusive Benefit. The Company shall have no beneficial interest in any asset of the Trust, and no part of any asset in the Trust shall ever revert to or be repaid to the Company, either directly or indirectly, prior to the satisfaction of all liabilities with respect to the Participants and their Beneficiaries under the Company's Plan. No part of the corpus or income of the Trust Fund, or any asset of the Trust, may be used for, or diverted to, purposes other than the exclusive benefit of the Participants or their Beneficiaries.

12.02. Contingent Nature of Contributions. To the extent that the deductibility thereof is subsequently denied, any contribution made by the Company to the

Trust is made expressly contingent upon the deductibility of such contribution for Federal income tax purposes for the year with respect to which such contribution is made. Each such contribution is contingent upon maintenance of the qualified status of the Plan and Trust for the year with respect to which the contribution is made, to the extent that the loss of qualified status would deprive the Company of the deduction taken for such contribution. In the event that any refund is paid to the Company hereunder, such refund shall be without interest and shall be deducted from the Company contribution accounts of the Participants as an investment loss. All refunds shall be limited in amount, circumstance, and timing to the provisions of Act §403(c), including: (a) in the case a contribution is made by the Company by mistake of fact, the same may be returned to the

Company if made within one (1) year from the date of payment of the contribution which was made by a mistake of fact; (b) a contribution to the Plan which was conditioned on the qualification of the Plan under Code §401 and if the Plan does not so qualify, then the contribution may be returned to the Company within one (1) year after the date of the denial of qualification of the Plan; (c) if the contribution is made by the Company to the Plan conditioned upon the deductibility of the contribution under Code §404, then if the deduction is disallowed, the contribution may be returned to the Company, to the extent so disallowed, within one (1) year after the disallowance of the deduction; or (d) if the contribution is made by the Company to the Plan which would otherwise be an excess contribution, as defined in Code §4972(b), then a correcting distribution with respect to

such contribution may be made from the Plan to the Company to the extent permitted in Code §4972 to avoid the payment of excise taxes on excess contributions under such section.

12.03. Amendment of the Plan. The provisions of this Plan may be amended at any time by the Company; provided, however, that no amendment shall be effective unless written notice is given to the Trustee. No amendment shall increase the duties or liabilities of the Trustee or Administrator without its consent. No amendment shall deprive any Participant, or Beneficiary of a deceased Participant, of any of the benefits to which he is entitled under this Plan, or otherwise decrease the balance in any Participant's Account. No amendment shall provide for the use of funds or assets held to provide benefits under this Plan other than for the support and maintenance of Employees and their

Beneficiaries, or to provide that funds may revert to the Company.

Each amendment shall be approved by the Company's Board of Directors, or other management group if the Company is not incorporated. Notwithstanding the foregoing, any amendment necessary to initially qualify this Plan under Code §401(a) may be made without further approval of the Board of Directors (or such other group) if it is signed by the proper representatives of the Company.

12.04. Amendment to Vesting Schedule. The Company shall not amend the vesting schedule as set forth in §5.03 if the amendment would reduce the non- forfeitable percentage of any Participant's Accrued Benefit derived from Company or Participant contributions. If the Company makes a permissible amendment to the vesting schedule,

each Participant with three (3) Years of Service with the Company may elect to have the percentage of his nonforfeitable Accrued Benefit be computed without regard to the amendment. A Participant must file his election with the Administrator within seventy-five (75) days from his receipt of a copy of the amendment changing the vesting schedule. The Administrator, as soon as practicable, shall forward a copy of the amendment to the vesting schedule to each Participant with at least three (3) Years of Service together with an explanation of the effect of the amendment, the appropriate form on which the Participant may make an election to remain under the vesting schedule provided prior to the amendment, and the time within which the Participant must make an election to remain under the prior vesting schedule.

12.05. Discontinuance. The Company shall have the right, at any time, to suspend or discontinue its contribution under the Plan, and to terminate, at any time, this Plan and Trust. The Plan shall terminate upon the first to occur of the following:

(a) The date terminated by action of the Company;

(b) The date the Company shall be judicially declared bankrupt or insolvent; or

(c) The dissolution, merger, consolidation, or reorganization of the Company, or the sale by the Company of all or substantially all of its assets, unless the successor or purchaser makes provision to continue the Plan, in which event the successor or purchaser shall substitute itself as the Company under the Plan.

12.06. Full Vesting on Termination. Notwithstanding any other provision of this Plan to the contrary, upon the termination or partial termination of the Plan, or upon complete discontinuance of contributions to the Plan, a Participant's right to his Accrued Benefit shall be one hundred percent (100%) nonforfeitable. Partial termination, for purposes of this Plan, means a significant reduction in the number of Employees participating, or being eligible to participate, in this Plan. The Administrator shall interpret and administer this §12.06 in accordance with Code §411(d)(3).

12.07. Merger. The Trustee shall not consent to, or be a party to, any merger or consolidation with another plan or to transfer assets or liabilities to another plan, unless immediately thereafter, the surviving plan provides each Participant a

benefit equal to, or greater than, the benefit each Participant would have received had the Plan terminated immediately prior to the merger, consolidation, or transfer.

12.08. Termination. Upon termination of the Plan, the provisions of Article VI shall remain operative, and the Trust shall continue until the Trustee has distributed all of the benefits under the Plan. On each Allocation Date, the Administrator shall credit any part of a Participant's Accrued Benefit remaining in the Trust with his proportionate share of the Trust income, expenses, gains, and losses, both realized and unrealized.

14.09 Spendthrift Trust. This Plan is intended to qualify as a spendthrift trust. It is therefore intended that payments made pursuant to this Plan are for the support and

maintenance of the Participants and their Beneficiaries. To the extent permitted by law, none of the benefits, proceeds, payment or amounts held or paid by the Trustee under this Plan shall be subject to the claims of creditors of Participants or Beneficiaries of this Plan, the Trustee shall take such steps as it deems necessary to preserve such interest for the benefit of the Participant or his Beneficiary, however, this provision does not preclude the Trustee from complying with a court order requiring deduction from the benefits of a Participant in pay status for qualified domestic relations orders, as provided under Section 6.09.

Supreme Court, U.S.
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No. 91-1394

In The

Supreme Court of the United States

October Term, 1991

RONALD J. WYLES and REGINA L. WYLES,

Petitioners,

vs.

DEAN W. SWORD, JR., TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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9

QUESTION PRESENTED

Whether 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1) are non-alienation and anti-assignment federal non-bankruptcy law, or whether they simply state minimal requirements a contract must contain to qualify as an employee pension benefit plan under the Employee Retirement Income Security Act of 1974, as amended ("ERISA")?

LIST OF PARTIES

The list of all parties provided by petitioners is complete.

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Sixth Amendment 2

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

This list is correctly reported by the petitioners.

STATUTES INVOLVED

These statutes are correctly reported by the petitioners.

STATEMENT OF THE CASE

This statement is correctly made by the petitioners.

SUMMARY OF ARGUMENT

This case is not of sufficient imperative public importance to warrant a writ of certiorari before the Court of Appeals for the Fourth Circuit considers the case and renders judgment.

No right of the Wyles protected by the Constitution is at issue; a case now before this Court addresses all issues the Wyles raise; and, this case is no longer of public importance because Congress introduced legislation in both the Senate and the House of Representatives that answers the question raised.

REASONS FOR DENYING THE WRIT

I.

THIS CASE IS NOT OF IMPERATIVE PUBLIC IMPORTANCE.

Although this Court has granted writs of certiorari before courts of appeals consider cases and render judgments, that relief is limited to circumstances which are not present here. In *Wilson v. Bohlander,* 361 U.S. 281, 80 S. Ct. 305, 4 L. Ed. 2d 282 (1960), a civilian employee of the United States military was court martialed and incarcerated. The civilian filed a writ of habeas corpus, asserting his right, protected by Amendment VI to the Constitution of the United States, was violated by the military court. In *Hannah v. Slawson,* 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960), at issue were rules which deprived Negro voters of the right to vote, which was protected by the Due Process Clause of Amendment V to the Constitution of the United States.

This Court granted writs of certiorari in each of those cases, and decided the constitutional questions, before the courts of appeals rendered judgments.

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963), raised an issue of international law of importance sufficient to warrant granting a writ of certiorari before the Court of Appeals for the District of Columbia Circuit rendered a judgment.

The Wyles raise no issue of constitutional proportion or international law. Filing a petition in bankruptcy invokes no right or privilege protected by the Constitution. *United States v. Kras,* 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).

II.

THE WYLES' POSITION IS ADEQUATELY PROTECTED.

This Court granted a writ of certiorari in a case legally and factually identical to this one. *Patterson v. Shumate,* No. 91-913. That similarity is the whole reason the Court of Appeals for the Fourth Circuit held this case in abeyance.

Additionally, the Wyles demonstrate no reason their position as appellees in the court below is inadequately addressed or not protected by the respondent in *Patterson, id.*

III.

THIS CASE IS NO LONGER ONE OF MONUMENTAL PUBLIC IMPORTANCE.

On November 19, 1991, two bills, S. 1985 and H.R. 3804,

were simultaneously introduced in Congress. They answer the very question raised by this case; they will amend the Bankruptcy Code to establish by statute that interests of individuals in ERISA-qualified employee pension benefit plans are not estate assets subject to administration by trustees in bankruptcy. That legislation will codify the result in *Shumate v. Patterson,* 943 F.2d 362 (4th Cir. 1991), and its progeny.

Congress answered the question of monumental public importance through legislation. Therefore, even if this Court reverses the court of appeals in *Shumate v. Patterson, id.*, that outcome and the result in this case will be isolated results taken from the slice of time in which the Wyles and Shumate voluntarily filed their petitions in bankruptcy. Even if Shumate loses in this Court, it will effect no issue of public policy; Congress addressed that issue fully on November 19, 1991.

Finally, if this case is of the monumental public importance the Wyles suggest, they should want that issue decided sooner rather than later. For that reason, this Court should deny certiorari in this case and hear oral argument as scheduled on April 20, 1992 in *Patterson v. Shumate,* No. 91-913.

CONCLUSION

For the reasons stated herein, Respondent Dean W. Sword, Jr., Trustee, prays this Court deny the Wyles' petition for a writ of certiorari.

Respectfully submitted,

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Attorneys for Respondent